

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: GOOGLE BOOKS 05 Civ. 8136 (DC)

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New York, N.Y.  
September 15, 2011  
11:00 a.m.

Before:

HON. DENNY CHIN

Circuit Judge

APPEARANCES

BONI & ZACK LLC  
Attorneys for author plaintiffs  
BY: MICHAEL J. BONI  
JOANNE E. ZACK

DEBEVOISE & PLIMPTON LLP  
Attorneys for publisher plaintiffs  
BY: BRUCE P. KELLER  
JEFFREY P. CUNARD

DURALYN J. DURIE  
JOSEPH GRATZ  
DAPHNE KELLER  
HILARY WARE  
Attorneys for Defendant

ALSO PRESENT:

CADWALADER, WICKERSHAM & TAFT LLP  
BY: COLIN A. UNDERWOOD

MISHCON DE REYA NEW YORK LLP  
Attorneys for Plaintiffs in 10 Civ. 2977 (DC)  
BY: VINCENT FILARDO, JR.

1 (Case called)

2 THE CLERK: For all parties could state their  
3 appearances for the record, please.

4 MR. BONI: Your Honor, good morning. Michael Boni for  
5 plaintiff Authors Guild and other authors.

6 MS. ZACK: Joanne Zack for the Authors Guild, your  
7 Honor. Good morning.

8 MR. KELLER: Bruce Keller for the publisher  
9 plaintiffs, your Honor.

10 MR. CUNARD: Jeffrey Cunard, also for publisher  
11 plaintiffs.

12 MS. DURIE: Good morning, your Honor. Daralyn Durie  
13 and Joe Gratz for Google. With me are Hilary Ware and Daphne  
14 Keller from Google.

15 THE COURT: Good morning. Is there anyone here from  
16 Cadwalader?

17 MR. UNDERWOOD: Yes, your Honor. Colin Underwood of  
18 Cadwalader, Wickersham & Taft. Would you like me to step  
19 forward?

20 THE COURT: Yes, please. I received a letter from Mr.  
21 Underwood advising that Cadwalader may be appearing in the  
22 second case, the photographers case. This raises an issue  
23 because my wife is a partner at Cadwalader.

24 First, there is a little bit of uncertainty in your  
25 letter. Do we know whether Cadwalader will be making an

1 appearance in the photographers case?

2 MR. UNDERWOOD: Your Honor, at this point it is not  
3 our intention to make an appearance in this case. It is an  
4 accommodation for an associate who moved from Mishcon to  
5 Cadwalader, Mr. Julian Perlman. Presently the firm has no  
6 intention of making an appearance in the litigation. It is  
7 solely to assist in the transfer of knowledge and to smooth the  
8 transition of the case.

9 THE COURT: I see. In the photographers case, counsel  
10 of record for the plaintiffs is the Mishcon de Reya firm. Is  
11 there anyone here from Mishcon de Reya? Good morning. Come  
12 forward, please. State your name for the record.

13 MR. FILARDO: Vincent Filardo, Jr.

14 THE COURT: Is your firm planning at the moment on  
15 remaining counsel of record in the photographers case?

16 MR. FILARDO: Yes, we are, your Honor.

17 THE COURT: Unless anyone is making a request, I don't  
18 think I need to do anything in light of the fact that at the  
19 moment Cadwalader is not making an appearance and it sounds  
20 like they probably won't. Does anyone feel differently? If  
21 so, please speak up.

22 Thank you both. I don't see any need to take any  
23 further action at this point. By the way, the photographers  
24 are content just to wait and see what happens, is that true?

25 MR. FILARDO: Your Honor, we are still taking that

1 under advisement. We are waiting for Google's time to answer  
2 to expire. We have given Google an extension of the time to  
3 answer the complaint. That will be coming to a close I believe  
4 in October. We will take the issue up then.

5 THE COURT: I think I have granted eight extensions or  
6 something like that. My question is, are the parties content  
7 to keep a second case on a holding pattern waiting for the  
8 first case or is someone going to ask me to do something  
9 different? I don't know that we need to have these monthly or  
10 bimonthly requests for an extension of time.

11 MR. FILARDO: Judge, I don't think that is going to be  
12 the case going forward. We will be prosecuting the matter.

13 THE COURT: OK. We will wait and see what happens  
14 after the expiration of the next extension. Thank you.

15 On the main case, where are we?

16 MR. BONI: Your Honor, Michael Boni again for the  
17 author plaintiffs. Based on the direction from the Court at  
18 our last status conference, the parties have worked and agreed  
19 upon a pretrial schedule. We have it here. We conferred. We  
20 met and conferred, came to agreement on dates. I'm happy to  
21 send a proposed scheduling order up or I can just read off the  
22 dates.

23 THE COURT: You can read off the dates. But first,  
24 does this suggest that there is no progress being made any  
25 longer in terms of settlement? You are still talking? Where

1 are you?

2 MR. BONI: Your Honor, I'm speaking now solely for the  
3 author plaintiffs. It is our position that we would like very  
4 much to continue a dialogue, a settlement dialogue, with Google  
5 to settle the case. You will hear from the publishers in a  
6 moment. But from the authors' perspective, we would like very  
7 much, on a parallel track with litigation, to try to work out a  
8 satisfactory settlement for the author subclass or for the  
9 author class if it comes to that.

10 THE COURT: Mr. Keller?

11 MR. KELLER: Your Honor, we have no objection to the  
12 schedule that is about to be proposed to the Court. One of the  
13 reasons we have no objection to it is that we think we have  
14 made enough progress in our discussions with Google so that the  
15 schedule may not matter. We are not entirely there yet, but we  
16 will know we hope sooner than later. If you adopt the dates  
17 that are being proposed, we hope that those dates will become  
18 moot insofar as we are concerned.

19 THE COURT: So the parties are still talking, are  
20 still hopeful, but in light of my statements last time you are  
21 proposing a schedule?

22 MR. BONI: Yes, your Honor.

23 MR. KELLER: Correct.

24 THE COURT: What is the proposed schedule?

25 MR. BONI: Would you like me to hand it up?

1 THE COURT: Sure.

2 MR. BONI: Your Honor, we are not sure yet. This is  
3 not something for the Court's signature, because we deleted B.  
4 We thought the plaintiffs would be in a position to file their  
5 opening brief in support of a class certification motion by  
6 December 12 of 2011, that the defendants' response to  
7 plaintiffs' class certification motion be filed by January  
8 26th, and plaintiffs' reply brief would be filed March 12th.

9 We propose for merits discovery to be completed by the  
10 end of March, March 30, which is a little more than a six-month  
11 discovery schedule beginning today. We have not yet served,  
12 except in 2006, discovery requests or anything like that.

13 THE COURT: It would be essentially starting from  
14 scratch.

15 MR. BONI: That's correct, your Honor.

16 MS. ZACK: Not completely.

17 THE COURT: Essentially.

18 MR. BONI: For all intents and purposes, you're right,  
19 your Honor.

20 THE COURT: When did you serve them? 2006?

21 MR. BONI: 2006. We propose that the parties exchange  
22 expert reports on April 20, 2012, and expert rebuttal reports  
23 by May 10, 2012, and then have a brief period for expert  
24 depositions to be taken between May 14 and May 25, 2012. We  
25 would propose that motions for summary judgment, if any, shall

1 be filed by May 31, 2012. Oppositions would be filed July 9,  
2 2012, and the reply briefs would be filed by the end of July  
3 2012. Then we have a blank date for the next pretrial  
4 conference.

5 THE COURT: Is this a case where both sides are likely  
6 to make summary judgment motions? I would think.

7 MR. BONI: Plaintiffs have not yet made that decision,  
8 your Honor.

9 MS. DURIE: Your Honor, we haven't made a final  
10 decision, but it seems to me probable.

11 THE COURT: It seems to me probable unless the case  
12 changes. I notice that there is a paragraph 1(a) which you  
13 skipped in this document on a motion to amend the third amended  
14 complaint.

15 MR. BONI: Your Honor, that is more ministerial. By  
16 definition the operative complaint was solely in connection  
17 with the amended settlement agreement. It was a third amended  
18 complaint that combined the publishers' action with the  
19 authors' action, created subclasses. If the authors go forward  
20 and if the publishers settle, then that amended complaint would  
21 be amended and would have to be, by definition, different. We  
22 would hope to do that as soon as possible.

23 THE COURT: This proposal applies to both cases or  
24 just to the authors case?

25 MR. BONI: As of right now it applies to both cases.

1 THE COURT: One of the issues in the case is whether  
2 this case is about snippets and the use of snippets for search.  
3 Are the plaintiffs contemplating trying to expand the case  
4 beyond the use of snippets for search?

5 MR. KELLER: I addressed this issue at the fairness  
6 hearing, your Honor. I know that's what a lot of people have  
7 said the case is about.

8 THE COURT: Including me.

9 MR. KELLER: We do not agree, speaking for the  
10 publishers, that the case is solely about snippets. At the  
11 time the complaints, the original complaints, not the ones  
12 amended for purposes of settlement, were filed, snippets were  
13 in the forefront of the controversy, no doubt about it. But it  
14 is about the copying, scanning, and storing of entire books.  
15 That is a distinction that is a material difference from our  
16 perspective. So I just have to for the record point out that  
17 we don't agree with the characterization about snippets.

18 THE COURT: Copying, scanning, and storing.

19 MR. KELLER: And subsequently displaying either in  
20 whole or in part, including but not limited to snippets,  
21 depending upon --

22 THE COURT: But not selling? You didn't include  
23 selling.

24 MR. KELLER: No, I did not, your Honor. That was part  
25 of the proposed settlement agreement in terms of making things



1 available for a fee. That's not what the allegations of the  
2 complaint focus on right now.

3 MR. BONI: Your Honor, back then the publishers filed  
4 a separate complaint, we filed our complaint. I want the  
5 record to reflect that we had precisely, if not verbatim,  
6 precisely in substance the same allegations. We, too, object  
7 to the characterization of our allegations against Google as  
8 limited strictly to the display of snippets.

9 But copying and distribution in ways that we couldn't  
10 even foresee, and that was in the complaint at the time, that  
11 were reasonably foreseeable but that we couldn't envision back  
12 in 2005, that is a very important allegation in light of the  
13 markets and how they have developed since 2005.

14 THE COURT: I understand. In other words, the third  
15 amended complaint was filed principally as part of the  
16 settlement, and if the case is going to be litigated, both sets  
17 of plaintiffs may want to file different complaints. I gather  
18 Google might object.

19 MS. DURIE: Your Honor, obviously, we would want to  
20 see the proposed amended complaint.

21 THE COURT: If there is no objection, you would just  
22 submit it for my approval.

23 MR. BONI: Yes, your Honor.

24 THE COURT: But you wouldn't need a motion. OK.

25 This means that we would be litigating this case for

1 another year at least, even assuming we stick to this schedule,  
2 right?

3 MR. BONI: For all practical purposes. We have  
4 summary judgment fully briefed by July, nine months.

5 THE COURT: You think you need that time in part  
6 because you are still talking?

7 MR. KELLER: Yes, in part, that's correct, your Honor.

8 THE COURT: Does anyone object to the schedule?

9 MS. DURIE: No, your Honor. We have met and conferred  
10 and we agree with it.

11 THE COURT: I will adopt the schedule. We'll issue an  
12 order that lays it out. Do you feel a need to see me at any  
13 time before submission of the motion?

14 MR. BONI: Your Honor, at this time no, but we  
15 certainly would like to --

16 THE COURT: I'll pick a date for oral argument, I  
17 would think I would want argument, and leave it at that. If  
18 the parties want to see me before then, just let us know. I  
19 also am losing my courtroom, so we'll have to let you know what  
20 courtroom we will be in next state your name. We'll have to  
21 borrow a courtroom from someone.

22 Is there anything the Court can do to help with  
23 settlement discussions?

24 MR. BONI: Your Honor, plaintiff authors at the last  
25 status conference, albeit we are out there alone, we welcome

1 the assistance, if it could help, of either a private mediator,  
2 a magistrate, or a court-appointed mediator to help us see  
3 through to finality a possible settlement resolution. We did  
4 not discuss this with Google nor have agreement with Google.

5 MS. DURIE: Your Honor, as Mr. Keller indicated, we  
6 have made substantial progress with the publishers. With  
7 respect to the authors, these discussions are taking place  
8 primarily not between the lawyers but among the principals. We  
9 certainly welcome the opportunity to continue those  
10 discussions, and I expect that they will continue. But, as I  
11 indicated last time, I'm not sure that this is a case that is  
12 particularly amenable to the services of the Court, because we  
13 are really talking about discussions between business  
14 principals.

15 MR. BONI: Your Honor, may I add one brief response to  
16 that?

17 THE COURT: Yes.

18 MR. BONI: That is partially true with respect to the  
19 Authors Guild class action case, that is, the authors case. In  
20 fact, as I'm sure the Court knows, class counsel have broad  
21 latitude to negotiate with respect to the best interests of the  
22 class. I think that Ms. Durie is absolutely correct that for  
23 the time being the negotiations have been principal to  
24 principal, but that's not necessarily how it has to be as a  
25 matter of course.

1 THE COURT: Let me say this. Over the years I've been  
2 active in settlement, including in class actions. I settled  
3 one class action where I had 18 sessions with the lawyers. If  
4 the parties want my help, I can try.

5 I don't think this is a case where I appoint someone.  
6 I don't know who I would appoint. It seems to me the parties  
7 can always go get a professional mediator. I could always help  
8 come up with some suggestions. But this is not a case where  
9 I'm going to reach out to someone and ask them to do it pro  
10 bono.

11 I'm not sure who the magistrate judge is on the case.  
12 I could refer it to the magistrate judge assigned to the case  
13 to see if he or she can try. I understand that the docket  
14 reflects that it is Judge Eaton, who has retired from the  
15 court. We would have to get a new magistrate judge assigned.  
16 I don't know if there is one assigned in the photographers  
17 case.

18 Magistrate Judge James Cott is designated as the  
19 magistrate judge on the photographers case. I don't know  
20 whether he would pick up the second case. I would guess so.  
21 In any event, that is an option, to ask him to assist with  
22 settlement.

23 What I'm saying is those are options. If we can help,  
24 if the parties want assistance, let us know and we can try.  
25 Otherwise, I'll enter an order laying out the schedule, which I

1 think is generous but is acceptable to me. We'll see whether  
2 the photographers want to do anything differently. When the  
3 time comes, they can write a letter. If we need to have a  
4 conference specifically about the photographers case, we will.

5 Right now the publishers case is folded into this one,  
6 right; one order will do for now?

7 MR. KELLER: That's correct for now.

8 THE COURT: If you need anything, you will write me a  
9 letter and let me know. Is there anything else for today?

10 MR. BONI: No, your Honor.

11 MS. DURIE: No, your Honor.

12 MR. KELLER: Nothing else, your Honor.

13 THE COURT: Thank you. Will you order the transcript  
14 so I have it? Thanks.

15 (Adjourned)

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